FOR ARGUMENT

78-753

In the Supreme Court of the United States

OCTOBER TERM, 1978

GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, ET AL., PETITIONERS

v.

JOHN R. NOVOTNY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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QUESTIONS PRESENTED

1. Whether officers and directors of a corporation, acting on behalf of the company, can form a conspiracy for the purposes of 42 U.S.C. 1985(c).

2. Whether a violation of Title VII of the Civil Rights Act of 1964 is a deprivation of "equal privileges and immunities" within Section 1985(c).

3. Whether the Commerce Clause may be invoked as a constitutional predicate for Section 1985(c) insofar as it reaches Title VII rights.

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Both the Attorney General and the Equal Employment Opportunity Commission are empowered to bring civil actions to enforce Title VII of the Civil Rights Act of 1964 and the Commission, additionally, has substantial administrative responsibilities for dealing with charges of employment discrimination. 42 U.S.C. 2000e-5, 2000e-6; President's Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978). Accordingly, the Department of Justice and the Commission have an interest in any enforcement mechanisms that contribute to achieving the goals of Title VII. For that reason, among others, we participated as amicus curiae in this Court in *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975), and *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), which considered in other contexts the question whether Title VII is the exclusive remedy for employment discrimination.

The national commitment to eliminate discrimination in public life is an independent ground for our participation in cases involving federal civil rights legislation. *E.g.*, *Runyon* v. *McCrary*, 427 U.S. 160 (1976); *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). That consideration prompted us to address the meaning of Section 1985(c) as

amicus curiae in *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971). It seems appropriate that we speak again as that statute returns before the Court.

STATEMENT

Respondent, John R. Novotny, brought this suit against his former employer, Great American Federal Savings and Loan Association (GAF), and nine of its present or former directors and officers. Until discharged, respondent was secretary and a director of the corporation. Seeking monetary and injunctive relief, he alleged violations of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and 42 U.S.C. 1985(c) (Pet. App. 77a).[1]

The complaint alleges that, in January 1975, after a female GAF employee had been discharged for protesting the company's promotion policies and after respondent had spoken out against these allegedly discriminatory policies at a meeting of the board of directors, his fellow board members voted to fire him as secretary and as a GAF employee (Pet. App. 80a-81a ¶¶ 19-24). His own discharge, he stated, was the result of "an agreement and conspiracy by and among the individual defendants to deprive Novotny of and to penalize him for the exercise of his constitutional

[1] This suit was initiated only after respondent had exhausted his administrative remedies under Title VII. Within a week of his discharge, he had filed a charge with the Equal Employment Opportunity Commission. Almost two years later, the Commission issued a "right to sue" letter under 42 U.S.C. 2000e-5. Only then did respondent resort to court proceedings.

rights to freedom of expression and association" because of his "support for equal employment opportunity for women within the GAF organization" (Pet. App. 81a-82a ¶¶ 25-26).

According to the complaint, respondent's discharge was one step in a conspiracy against female employees, the defendants having "intentionally and deliberately embarked upon and pursued a course of conduct the effect of which was to deny to female employees equal employment opportunity * * * for promotion and advancement" (Pet. App. 79a ¶ 16, 81a-82a ¶¶ 25-27).

The district court granted petitioners' motion to dismiss (Pet. App. 76a). As to the claim under Section 1985(c), the court held that officers and directors of a single corporation are legally incapable of forming a conspiracy (Pet. App. 73a). Respondent's Title VII claim was also dismissed, on the ground that Section 704(a) of Title VII, 42 U.S.C. 2000e-3(a), reaches retaliatory discharges only where the severed employee has made a charge or testified in a formal proceeding (Pet. App. 74a).

The court of appeals, en banc, unanimously reversed. That court concluded that intra-corporate conspiracies are not beyond the reach of Section 1985(c) (Pet. App. 55a). The court went on to hold that conspiracies motivated by invidious discriminatory animus against women are actionable under Section 1985(c) and that respondent as a male injured in the course of such a conspiracy has standing to sue

(Pet. App. 18a, 21a).[2] The argument that Section 1985(c) was not intended to embrace rights created by Title VII was rejected (Pet. App. 36a, 40a). So was the suggestion that constitutional obstacles prevented that result (Pet. App. 49a).

With respect to respondent's cause of action under Section 704(a) of Title VII, the court of appeals held, contrary to petitioners' argument, that Congress did not intend to restrict protection to participation in formal EEOC proceedings only (Pet. App. 59a).[3]

ARGUMENT

INTRODUCTION AND SUMMARY

1. A century ago, Congress subjected to civil and criminal liability those who "conspire * * * for the purpose of depriving * * * any person or class of persons * * * of equal privileges and immunities under the laws." Act of April 20, 1871, ch. 22, Section 2, 17 Stat. 13 (Ku Klux Act). Not long afterwards, this Court struck down the criminal portion of the statute, *United States* v. *Harris*, 106 U.S. 629 (1882), and Congress repealed that provision. Act of March 4, 1909, ch. 321, 35 Stat. 1088, 1154. The civil remedy survived, presumptively invalid and unused, until it was put out of harm's way in *Collins* v. *Hardyman*, 341 U.S. 651 (1951). Then, some eight years

[2] These latter two rulings were not challenged by the petition for certiorari.

[3] This ruling, also, was not challenged by the petition for certiorari and, accordingly, is not before this Court.

ago, the Court in *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), removed the shackles that had disabled Section 1985(c) from performing a useful role in the continuing effort to secure equal rights. That apparent liberation has proved very limited, however. The provision has not fared well in the lower courts, many obstacles having been found to restrict its application.

At length, the Court of Appeals for the Third Circuit, sitting en banc, has unanimously ruled that, in aggravated circumstances, Section 1985(c) vindicates the right to equal employment opportunities secured by Title VII of the Civil Rights Act of 1964 and that case is now here. Once again, the Court is called upon to decide the fate of the statute.

The basic question before the Court is whether Section 1985(c) shall be relegated to those now happily infrequent instances in which group violence, typically outside the area of ordinary business relations, threatens the enjoyment of fundamental rights. Since most such cases are more appropriately dealt with under criminal civil rights statutes, old and new (*e.g.*, 18 U.S.C. 241, 242, 245), such a construction of Section 1985(c) would give it a very small part indeed in the unfinished work of combating discrimination. It would be ironic, moreover, to so confine what is today a wholly civil remedial statute when its criminal analogs reach nonviolent interference with civil rights. *E.g.*, *Guinn* v. *United States*, 238 U.S. 347 (1915); *United States* v. *Mosley*, 238 U.S. 383 (1915); *United States* v. *Classic*, 313 U.S. 299 (1941); *Anderson* v. *United States*, 417 U.S. 211 (1974). Today, the promise of Section 1985(c) is fulfilled only if it

reaches concerted, but non-violent, discrimination in employment, housing and access to services.

On the other hand, we do not suggest that Section 1985(c) is a cure for all ills. On the contrary, this Court has precisely limited the thrust of the provision by insisting that it be reserved for aggravated cases in which a number of like-minded individuals, sharing a class-based invidiously discriminatory animus, join in a scheme to deprive citizens of their federally secured rights. Those conditions assure that the statute will not unduly intrude on the conciliation process. But, in our submission, there is no warrant for erecting additional barriers to the invocation of Section 1985(c). Construed consistently with its language, the provision will serve a discrete but important function both as remedial tool and deterrent.

2. The burden of our brief is to defend the decision of the court of appeals against the several challenges mounted by petitioners. We follow petitioners' sequence in dealing with their arguments.

(a) Initially, the proposition is advanced that Section 1985(c) does not reach officers or agents of the same corporation who join in fashioning or implementing a discriminatory employment policy, so long as they are acting on behalf of the company. We examine that supposed rule and show that it has no basis in corporation law, or the law of agency or tort, or in general conspiracy law. When agents of a firm, whether or not incorporated, act in such a way as to render themselves personally liable, there is no reason

in law or logic why they should not be deemed co-conspirators when they join together to achieve that unlawful end.

Looking more particularly to Section 1985(c), we find no occasion to make a special exception. On the contrary, that statute, originally written as a criminal provision, was, in our view, designed to attach individual responsibility to conspirators engaged in concerted discriminatory conduct, whether or not the participants were closely allied and furthering the interest of their principal. We note, however, that construing Section 1985(c) to reach intracorporate conspiracies does not implicate every company decision. Under the Court's holding in *Griffin* v. *Breckenridge, supra*, Section 1985(c) is applicable only when several officers or agents share a class-based invidously discriminatory animus and join in a scheme to deprive employees or applicants of their Title VII or other federal rights.

(b) We next address petitioners' contention that Section 1985(c) in no event reaches violations of Title VII. Looking to the text and the legislative history of the Ku Klux Act, we conclude that "privileges and immunities under the laws" plainly embraces rights declared by federal statutes. The object of Section 1985(c) was to provide an additional remedy for concerted action designed to prevent a class of citizens from enjoying their federal rights, whether declared by the Constitution itself or by an Act of Congress.

The suggestion that violations of Title VII, in particular, ought to be exempted from the coverage of

Section 1985(c) is quickly disposed of. In our view, this is a mere rehearsal of the argument advanced with respect to the applicability of Section 1981 and firmly rejected by this Court in *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975). Here, as there, recognizing an alternative remedy does not disrupt the scheme of Title VII, but, on the contrary, merely contributes to the achievement of the goal of eliminating employment discrimination.

(c) Finally, it is said that Section 1985(c) is not premised on the Commerce Clause and therefore cannot vindicate rights created under that source of congressional power. Although couched in constitutional terms, the argument is really one of statutory construction. The full answer, we submit, is that the 42d Congress—whatever its views as to the clause of the Constitution appropriately invoked—plainly meant to "put forth all its powers" (*United States* v. *Mosley*, 238 U.S. 383, 387 (1915)), and to protect *all* federal rights, both as presently established and as they might be declared in future legislation. Of course, as a purely remedial provision, Section 1985(c) is available only to those whose rights have been violated under other laws. But there is no cause to exclude Title VII rights merely because that statute, implementing the Commerce Clause, may not have been envisaged in 1871.

I. SECTION 1985(c) REACHES AN INTRA-CORPORATE CONSPIRACY

No doubt because it has won distinguished adherents in the courts,[4] petitioners set up as a first obstacle to the applicability of Section 1985(c) the supposed axiom of the civil law that the officers of a single corporation cannot "conspire" together, at least when they are acting on behalf of the company. We examine that propostion, both as a generality and in the particular context of the case.

1. The corporation is one of the law's more extravagant creations, "an artificial being, invisible, intangible, and existing only in contemplation of law," possessing "immortality" and "individuality." *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). In some circumstances, the consequence of incorporation is to shield from personal liability those who act on behalf of the company. That rule, we may assume, was left undisturbed by the Ku Klux Act of 1871, and we are, accordingly, content to obey usual corporate law when it requires us to look only to the unit and to ignore the human actors. But the law has never been so improvident as to disable itself altogether from "disregarding the corporate fiction whenever that is deemed necessary to attain a just result" (*Eisner* v. *Macomber*, 252 U.S. 189, 231 (Brandeis, J., dissenting) (1920)). This is such

[4] *E.g.*, *Dombrowski* v. *Dowling*, 459 F.2d 190 (7th Cir. 1972); *Girard* v. *94th St. & Fifth Ave. Corp.*, 530 F.2d 66 (2d Cir.), cert. denied, 425 U.S. 974 (1976); *Baker* v. *Stuart Broadcasting Co.*, 505 F.2d 181 (8th Cir. 1974).

a case. The facts alleged take the matter well beyond that sanctuary where individual conduct merges so completely with the corporate decision as to shield the actual wrongdoers.

It is quite right, we submit, to refuse to see a "conspiracy" under Section 1985(c) when the conduct complained of would not, under ordinary rules, render the corporate officers personally liable. Indeed, we may accept that board members, or other officers, who joined in a wrongful corporate decision innocently, or even negligently, could not be deemed "conspirators" although the corporation itself were accountable in damages. But we cannot appreciate why officers or directors who knowingly join in planning discriminatory action ought not be answerable as co-conspirators under Section 1985(c), just as they would be personally liable in tort or under 42 U.S.C. 1981 for like conduct. If the corporate veil would be pierced because the officers, although acting for the company, have overstepped the line of personal immunity, the same considerations, it seems to us, permit the court to examine the conduct of these officers under Section 1985(c).

The dispositive inquiry, in our view, is whether the kind of conduct condemned by Section 1985(c) would, as a matter of general law, subject the individual officers to personal liability, albeit they were acting on behalf of the company. Obviously, the rules governing vicarious responsibility will not answer the question. Whether the act was within actual or apparent authority may determine the liability of the corporation under the doctrine of respondeat superior. But

the accountability of individual agents is not ended merely because their principal also may be reached—whether that principal is a municipality, an unincorporated employer, or a corporation.[5] We must look more particularly at the rules that govern the personal liability of corporate officers.

It is common ground that the fiction of corporate unity does not insulate individual officers from responsibility for *criminal* conduct—even when the corporation itself is also answerable. *E.g.*, *United States* v. *Wise*, 370 U.S. 405 (1962). It is equally well-settled that corporate officers are accountable for tortious conduct, at least *intentional torts*. See, *e.g.*, *McCandless* v. *Furlaud*, 296 U.S. 140 (1935); *Davis H. Elliot Co.* v. *Caribbean Utilities Co.*, 513 F.2d 1176, 1182 (6th Cir. 1975); W. Fletcher, *Cyclopedia of the Law of Private Corporations*, §§ 1135, 1137 (rev. perm. ed. 1975). And, even more closely in point, the same rule obtains for the "tort" of discrimination under other civil rights legislation. See *Tillman* v. *Wheaton-Haven Recreation Association*, 517 F.2d 1141, 1144 (4th Cir. 1975) (42 U.S.C. 1981, 1982); *Clark* v. *Universal Builders, Inc.*, 501 F.2d 324 (7th Cir.), cert. denied, 419 U.S. 1070 (1974) (42 U.S.C. 1982); *Slack* v. *Havens*, 522 F.2d

[5] Construing the complaint as alleging a conspiracy only among the individual petitioners, the court of appeals did not reach the question of the corporation's liability (Pet. App. 52a). In those circumstances, it seems premature for this Court to consider whether the corporation itself should be deemed a co-conspirator or liable, alternatively, under the doctrine of respondeat superior.

1091 (9th Cir. 1975) (Title VII); *Tomkins* v. *Public Service Electric & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977) (Title VII); *United States* v. *Northside Realty Associates, Inc.*, 474 F.2d 1164 (5th Cir. 1973) (Fair Housing Act, 42 U.S.C. 3613); *United States* v. *Pelzer Realty Co.*, 537 F.2d 841 (5th Cir. 1976) (Fair Housing Act). Cf. *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978) (42 U.S.C. 1983).

Our case, quite plainly, is within the ambit of those rules. Section 1985(c) only reaches conduct that was deemed both criminal and tortious.[6] By definition, to "conspire" is to engage in deliberate and purposeful conduct. And, at all events, this Court has expressly restricted the reach of the provision to embrace only conspirators whose conduct, informed by "class-based, invidiously discriminatory animus," is intended to deprive the victim of a legal right. *Griffin* v. *Breckenridge*, 436 U.S. 88, 102-103 (1971). Section 1985(c) requires mens rea of a special kind, well beyond the state of mind sufficient for ordinary intentional torts and under many civil rights statutes imposing personal liability.

In sum, nothing in the law of torts or agency, or corporation law or civil rights law, justifies a holding

[6] The second section of the Civil Rights Act of 1871, as originally enacted, provided both criminal penalties and a civil damage action for the same conspiratorial conduct. R.S. 1980, Act of April 20, 1871, ch. 22, Section 2, 17 Stat. 13. The criminal counterpart of Section 1985(c) was codified separately in 1874 as R.S. 5519. It was repealed in 1909. Act of March 4, 1909, ch. 321, 35 Stat. 1088, 1154.

that corporate officers acting for the company enjoy immunity from personal liability under Section 1985(c) on the ground that their conduct "merges" into that of the corporation. The remaining question is whether the law of conspiracy or some other rule peculiar to Section 1985(c) erects a special obstacle to personal liability in these circumstances.

2. It is not immediately apparent why the law should, on the one hand, hold co-directors of a corporation personally answerable for their own intentional conduct on behalf of the company, and yet, on the other, grant them personal immunity when they conspire together to the same end. If there were such a rule, however, we would expect to encounter it, not only in the context of private corporations, but wherever agents have a common master.

Except for a questionable exception under some antitrust statutes (*infra*, pages 16-17), we find no principle that co-agents are, in law, incapable of conspiracy. The contrary has been generally accepted. Thus, employees of a single municipal corporation have been held civil conspirators under Section 1985(c). *Glasson* v. *City of Louisville*, 518 F.2d 899 (6th Cir.), cert. denied, 423 U.S. 930 (1975); *Hampton* v. *City of Chicago*, 484 F.2d 602 (7th Cir. 1973), cert. denied, 415 U.S. 917 (1974). And, under other statutes, civil and criminal, co-officers or co-employees have likewise been found to have conspired. *E.g.*, *Nye & Nissen* v. *United States*, 336 U.S. 613 (1949); *Fong Foo* v. *United States*, 369 U.S. 141 (1962); *United States* v. *Sampson*, 371 U.S. 75 (1962); *Ferguson* v. *Omni-*

media, Inc., 469 F.2d 194 (1st Cir. 1972); *Johnston* v. *Baker*, 445 F.2d 424 (3d Cir. 1971).

Many of the precedents just cited, it is true, involve prosecutions under criminal statutes. The reason is that conspiracy is primarily a criminal law concept.[7] But, in our submission, the same principle governs, whether the conspiracy is condemned in a civil or criminal statute.

Petitioners quote a passage from this Court's opinion in *Callanan* v. *United States*, 364 U.S. 587, 593-594 (1961), which articulates the enhanced dangers presented by a conspiracy (Pet. Br. 19). Although that discussion is in a criminal context, it seems clear like considerations lie behind every legislative decision to outlaw conspiracies, whether by imposing criminal or civil sanctions. Surely, it is equally true of intentional torts that lend themselves to co-operative efforts that "[c]oncerted action both increases the likelihood that the [wrongful] object will be successfully obtained and decreases the probability that the individuals involved will depart from their path of [tortious conduct]." So, also, in the non-criminal arena, "[g]roup association * * * often * * * makes possible the attainment of ends more complex than those which one [tortfeaser] could accomplish." And, finally, just as among criminals "[c]ombination * * * makes more likely the commission of crimes unrelated to the original purpose for which the group was formed,"

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[7] See Note, *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920 (1959).

so here, augmented opportunities exist for unlawful acts foreign to the original purpose of non-criminal combinations.

In the relatively few situations in which the non-criminal law singles out conspiracy, it is for the same reasons. There are no others. See Opinion of Brennan, J., in *Adickes* v. *Kress & Co.*, 398 U.S. 144, 221 (1970). At all events, in the context of Section 1985(c), it is quite impossible to fashion separate doctrines for civil and criminal liability, since, as originally enacted, the same statute imposed both civil and criminal sanctions against the identical conspiracy.[8]

Nor is there any pretext here for invoking the supposed antitrust exception. The holding that there can be no intra-corporate conspiracy under Section 1 of the Sherman Act is justified, if at all,[9] by the legislative focus in that provision on restrictive agreements between economic units, rather than individuals.[10] Accordingly, in that special context, the requirement of at least two co-operating units for a conspiracy has been applied in both criminal and civil cases. See, *e.g.*, *United States* v. *Carroll*, 144 F. Supp. 939 (S.D.N.Y. 1956). And, logically, the requirement obtains whether the economic units are partnerships or associations, rather than corporations. See *Hatley* v. *American Quarter Horse Association*, 552 F.2d 646 (5th Cir. 1977).

That special rule, it need hardly be said, can have no general application to the Ku Klux Act. The historical setting of our provision—sufficiently rehearsed in *Breckenridge*, *supra*, 403 U.S. at 98-102—forecloses any suggestion that the primary focus was on the action of economic units, rather than groups of individuals. It is equally clear that the prime targets of the law did not cease to be viewed as "conspirators" because they were acting as loyal and anonymous agents of the "Invisible Empire," rather than for purely personal reasons. Nor would anyone argue, we assume, that incorporation of the Klan in a particular area [11] immunized the local members so long as they were merely furthering "company policy." Every indication is that the authors of Section 1985(c) singled out conspiracies for the classical reason that combinations were thought to present a more serious threat than lone operators, and that they would have viewed the conspirators as all the more necessary to

[8] See note 6, above.

[9] The rationale of *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953), was a departure from earlier precedent and has been criticized by commentators (see Note, *Intracorporate Conspiracies Under 42 U.S.C. § 1985(c)*, 92 Harv. L. Rev. 470, 479-482 (1978); L. Sullivan, *Handbook of the Law of Antitrust*, 323-329 (1977); Comment, *Intra-Enterprise Conspiracy Under the Sherman Act*, 63 Yale L.J. 372, 385-387 (1954)). It has not been uniformly followed in the civil antitrust context. See *Greenville Publishing Co.* v. *Daily Reflector, Inc.*, 496 F.2d 391 (4th Cir. 1974).

[10] See Note, *supra*, 92 Harv. L. Rev. at 480-481.

[11] The modern Ku Klux Klan has incorporated and its leadership operates as a private corporation. *United Klans of America, Inc.* v. *McGovern*, 453 F. Supp. 836 (N.D. Ala. 1978).

reach by federal law when they were closely organized under the umbrella of a corporation, public or private.

3. What has been said sufficiently answers any suggestion that, as a general rule, Section 1985(c) does not notice like-minded confederates when they are all officers of a single corporation. But petitioners may be advancing a narrower argument: that, in the special case of an agreement to discriminate with respect to *employment*, the employer should be viewed as unitary and internal agreements therefore beyond the reach of Section 1985(c). The propostion requires separate consideration.

The consequences of such a rule must be understood. First, the exemption, if justifiable at all, must include *all* employers, whether unincorporated associations, partnerships, single proprietorships or corporations. The "unit" concept is no sounder as applied to the officers of a corporation than to two or more partners making a hiring or promotion decision. Moreover, since (as already shown) the reasons for singling out conspiracy are the same whether the sanctions are civil or criminal, the rule suggested logically would also exempt officers and agents of an employer from liability under the criminal analog of Section 1985(c), 18 U.S.C. 241—at least when their "conspiracy" carried out the firm's policy. Thus, in a backhanded way, the result would be to make Title VII of the Civil Rights Act of 1964 the exclusive remedy for discrimination in private employment on grounds other than race—except perhaps in the rare case of agents acting contrary to "company" policy or the

unlikely situation of several distinct employers banding together to implement a common discriminatory policy. As we demonstrate in a moment, that was not the congressional understanding.

At all events, the exemption suggested for employment cases is difficult to reconcile with the personal accountability of company officers under both Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1866. See *supra*, pages 12-13. If agents acting on behalf of their employer cannot escape individual liability under those statutes, how can a "unit" rule properly be invoked to bar their being considered "conspirators" within Section 1985(c)?

But that is not all. We can find no principled basis for exempting employment discrimination alone. Is not the policy or decision of a landlord, a railroad, a bank, a restaurant, a private school, an amusement park, equally "unitary"? Of course, in every area, there may be two or more individuals who join in acting contrary to the interests or the policy of the organization. But our concern is with the more common and more serious cases in which officers or agents are discriminating on behalf of their principal. In those circumstances, it is not possible to distinguish, as more or less unitary, a decision not to hire or promote from a decision not to sell or rent or serve or admit.

The upshot is that the "narrower argument" for exemption is, in the end, the same as the broader submission. And the practical result of sustaining either is to confine Section 1985(c) to wholly unauthorized discriminatory schemes. That would be to

render the statute useless where the most serious threat exists and where lies the greatest need of effective weapons: discrimination by established organizations. No doubt, in 1871, the major target was the Klan and the primary focus was on physical violence. But the statute then written was worded more broadly to cover all conspiracies intended to deprive citizens of equal enjoyment of any right secured by law. Here, too, we should follow the injunction announced by Mr. Justice Holmes, speaking for the Court, in *United States* v. *Mosley*, 238 U.S. 383, 388 (1915); "[N]ow that the Ku Klux have passed away * * *, we cannot allow the past so far to affect the present as to deprive citizens of the United States of the general protection which on its face [the statute] most reasonably affords." Today, conspiracies are less violent, the members often wear business suits, and discrimination is practiced in a corporate name. Yet, if Section 1985(c) is to be given "a sweep as broad as its language" (*United States* v. *Price*, 383 U.S. 787, 801 (1966)), it still condemns schemes to deny equal rights.

4. We do not suggest that Section 1985(c) reaches every discriminatory act of a corporation or other organization. First, of course, many "company" decisions are made by an individual on his sole authority. Moreover, as we have already noted, the fact that several officers join in the decision does not automatically create a "conspiracy." The teaching of *Breckenridge* is that there must be a *shared* discriminatory animus and a *joint purpose* to accomplish the prohibited injury. Thus, Section 1985(c) is by no

means co-extensive with Title VII in the area of employment discrimination. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). What is more, difficulties of proof are likely to inhibit frequent application of Section 1985(c).[12] But the allegations of the present case clearly bring it within the statute and no artificial obstacle ought to be erected to shield the alleged conspirators from liability if they have done what is charged against them.

II. SECTION 1985(c) REDRESSES DEPRIVATIONS OF RIGHTS SECURED BY TITLE VII

Constitutional objections aside (see *infra*, pages 30-34), petitioners argue that Section 1985(c) cannot be invoked to vindicate rights declared by Title VII of the Civil Rights Act of 1964. Why this should be so is not made entirely clear. But one proposition seems to be that Section 1985(c) was intended to reach only "violations of the fundamental rights of citizens" secured by the Constitution itself, as then recently amended. See Pet. Br. 24 n.18, 29. We turn first to that objection.

1. The statute on its face is plainly not confined to vindicating constitutional rights. In *Breckenridge*,

[12] Many claims brought under Section 1985(c) have been dismissed for failure to allege an actionable class-based conspiracy meeting the *Griffin* standard. See, *e.g.*, *Arnold* v. *Tiffany*, 487 F.2d 216 (9th Cir. 1973), cert. denied, 415 U.S. 984 (1974) (newspaper dealers); *Askew* v. *Bloemaker*, 548 F.2d 673 (7th Cir. 1976) (victims of illegal drug searches); *McLellan* v. *Mississippi Power & Light Company*, 545 F.2d 919 (5th Cir. 1977) (bankrupts); *Phillips* v. *International Ass'n of Bridge, S. & O. Iron Workers*, 556 F.2d 939 (9th Cir. 1977) (dissident union members).

this Court held that Section 1985(c) does protect against deprivation of the constitutional right of interstate travel and rights embraced by the Thirteenth Amendment. 403 U.S. at 104-106. But there is no suggestion in that case that rights immediately conferred by federal statutes—whatever the constitutional underpinings—are not equally within the scope of Section 1985(c). See 403 U.S. at 107. Nor has it been shown why "privileges and immunities under the laws" do not embrace all federal rights guaranteed against private invasion by the statutes of the United States. Cf. *United States* v. *Waddell*, 112 U.S. 76 (1884); *Logan* v. *United States*, 144 U.S. 263 (1892); *In re Quarles and Butler*, 158 U.S. 532 (1894). Indeed, except for the Fourth Circuit (*Doski* v. *Goldseker Co.*, 539 F.2d 1326 (1976)), every court that has considered the question has concluded that "the laws" mentioned in Section 1985(c) connotes at least some federal statutes. See, *e.g.*, *McLellan* v. *Mississippi Power & Light Company*, 545 F.2d 919 (5th Cir. 1977); *Marlowe* v. *Fisher Body*, 489 F.2d 1057 (6th Cir. 1973); *Means* v. *Wilson*, 522 F.2d 833 (8th Cir. 1975), cert. denied, 424 U.S. 958 (1976); *Lopez* v. *Arrowhead Ranches*, 523 F.2d 924, 928 (9th Cir. 1975) (by implication); *Curran* v. *Portland Superintending School Committee*, 435 F. Supp. 1063 (D. Maine 1977).

2. The correctness of this view is confirmed, if need be, by examining the legislative history of the provision. Nothing is clearer than that all those who addressed what became Section 2 of the Ku

Klux Act of 1871 (and ultimately Section 1985(c)) understood it to reach deprivations of rights conferred or confirmed by federal statutes as well as the Constitution.

It is not debatable that, as originally introduced, Section 2 protected rights defined by federal statutory law. The original bill expressly referred to "rights, privileges, or immunities of any person, to which he is entitled under the Constitution *and laws of the United States*." Cong. Globe, 42d Cong., 1st Sess. 366 (1871) (emphasis added). See, also, *id.* at 382, app. 113 (Rep. Shellabarger); 447 (Rep. Butler). The only question is whether statutory rights remained within the compass of the provision when "[t]he enormous sweep of the original language led to pressures for amendment" (*Breckenridge*, *supra*, 403 U.S. at 100) and the present wording was substituted.

The Court, in *Breckenridge*, has already identified the thrust of the narrowing amendment: "The explanations of the added language centered entirely on the animus or motivation that would be required." 403 U.S. at 100. There is no hint that rights secured by federal statutes would be removed from coverage, leaving only those derived directly from the Constitution itself. On the contrary, concern was expressed about including rights under state laws, but opponents of the original bill accepted that violations of federal statutes were properly reached. *E.g.*, Cong. Globe, *supra*, at 579 (Sen. Trumbull). The point was made explicit by Senator Thurman, a key opponent (*id.* at 822):

> If it were limited to offenses against the laws of the United States or the Constitution of the United States, it would be well worthy of consideration * * * [m]y objection to it is that it goes beyond offenses against the Constitution and the laws of the United States * * *.

And, again (*id.* at app. 218):

> [W]hat is meant by the word 'laws' in this section so far as I have read it? An intelligent court would decide that it meant the laws of the United States * * *. [13]

In sum, the opponents won their argument, not by confining the provision to constitutional rights only, but by requiring a discriminatory motivation. The upshot is that Section 1985(c) no longer created "a general federal tort law." See *Breckenridge*, 403 U.S. at 100-102. That potential objection is wholly removed by this Court's ruling that deprivations of rights are within the reach of the statute only when there is "class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* at 102. Thus, Section 1985(c) remains much narrower than its criminal analog, 18 U.S.C. 241. It embraces only *discriminatory* interference with the enjoyment of federal rights.[14] That is a discrete and limited cate-

[13] See, also, *id.* at 568 (Sen. Edmunds), app. 251 (Sen. Morton).

This case, of course, does not present any question concerning the extent to which Section 1985(c) protects the right under the Fourteenth Amendment to the equal protection of state law.

[14] Petitioners asserted in the court of appeals that conspiracies against women are not actionable under Section 1985(c). The court of appeals rejected this contention (Pet. App. 16a-18a). Petitioners apparently have abandoned this argument, since they do not raise it in the petition for certiorari. However, they state incorrectly that "No other circuit has ruled on application of Section 1985(3) to sex-based classes" (Pet. Br. 18 n.12). Both the Eighth and Ninth Circuits have specifically found sex-based conspiracies actionable under Section 1985(c). *Conroy* v. *Conroy*, 575 F.2d 175 (8th Cir. 1978); *Life Insurance Co. of North America* v. *Reichardt*, No. 75-3031 (9th Cir. Jan. 11, 1979).

gory of wrongs, at the very heart of the concern that animated the 42d Congress. So construed, Section 1985(c) does no more than fulfill its intended mission.

2. It is further objected, however, that conceding the applicability of Section 1985(c) to private employment discrimination "would destroy the careful enforcement mechanism created by Congress under Title VII" (Pet. Br. 35). That argument is not unfamiliar. On many occasions, this Court has been asked to construe modern civil rights legislation as impliedly repealing or qualifying like statutes of a century earlier and has declined to do so. *Jones* v. *Mayer Co.*, 392 U.S. 409, 413-417 (1968); *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 237-238 (1969); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 457-461 (1975); *Runyon* v. *McCrary*, 427 U.S. 160, 174-175 (1976). See, also, *United States* v. *Johnson*, 390 U.S. 563 (1968). And, specifically, the Court has rejected the argument in respect of Title VII. *Johnson* v. *Railway Express Agency, Inc.*, *supra; McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285-296 (1976). See, also *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974).

These precedents are dispositive here. To be sure, there are situations in which Congress, in declaring new rights, has made it clear that they shall be enforced only in prescribed ways. *E.g.*, *Brown* v. *GSA*, 425 U.S. 820 (1976); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978). In those circumstances, we may assume, Section 1985(c) affords no supplemental remedy. But, as the Court has expressly held, Title VII was not intended to shut off alternative avenues of relief.[15] Section 1981 remains available. There is no reasoned basis for concluding that Section 1985(c) does not.

It is true that, unlike Sections 1981 and 1982 which provide both right and remedy, Section 1985(c) merely adds a remedy for violation of a right created by other federal law, whether the Constitution or statutes, such as Title VII. In this respect, our statute is of a kind with Section 1983 which vindicates "rights, privileges or immunities secured by the Constitution and laws." Yet, it was explicitly noted in connection with the enactment of the 1972 Amendments to Title VII that Section 1983, like Section 1981, would remain applicable to employment discrimination. See H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 19 (1971); S. Rep. No. 92-415, 92d Cong., 1st Sess. 24 (1971); 118 Cong. Rec. 3371-3373

[15] The relevant legislative history of Title VII on this point has so recently been recounted in this Court that we abstain from rehearsing it once again. See *Johnson* v. *Railway Express Agency, Inc.*, *supra*, 421 U.S. at 457-461; *Runyon* v. *McCrary*, *supra*, 427 U.S. at 174 n.11.

(1972). Nor has it been suggested why any difference should be made. Equally with the other statutes of the same era, Section 1985(c) serves the end of providing an "alternative means to redress individual grievances," which, in the case of Title VII, the Congress deliberately chose to preserve. 118 Cong. Rec. 3371 (1972) (Sen. Williams). See, also, *id.* at 3370 (Sen. Javits).

In any event, recognizing the applicability of Section 1985(c) to redress employment discrimination creates no practical problems. There is no cause to apprehend that Title VII will be undermined. Although Section 1985(c) may permit plaintiffs to avoid Title VII's mechanisms, there are major disincentives for doing so, as recent experience with other statutes which parallel Title VII attests.[16] The litigant who, unlike Novotny, avoids Title VII's administrative procedures foregoes substantial benefits. His claim is not investigated by the government; he therefore has no access to the results of government-funded dis-

[16] In the present case, of course, respondent did not attempt to circumvent Title VII procedures. On the contrary, he exhausted his administrative remedies.

Petitioners argue that Novotny did not name GAF's directors in his EEOC charge. That omission would not bar their inclusion as defendants in a Title VII suit. See *Canavan* v. *Beneficial Insurance Co.*, 553 F.2d 860 (3d Cir. 1977); *Chastang* v. *Flynn & Emrich Co.*, 365 F. Supp. 957, 963-964 (D. Md. 1973), aff'd, 541 F.2d 1040 (4th Cir. 1976). But if a Title VII action were foreclosed because of Novotny's omission, that would be an argument in favor of affirming the court of appeals' holding that Section 1985(c) survives as a supplemental remedy.

covery.[17] The government cannot bring suit on his behalf.[18] He is not entitled to appointment of counsel.[19] And the burden of proof is substantially more onerous: under Section 1985(c), in addition to proving the underlying Title VII violations, the plaintiff must establish the existence of (1) a conspiracy; (2) class based animus; *and* (3) an intent to deprive one of rights protected by Title VII. Compare *Griggs* v. *Duke Power Co., supra.*

Implied partial repeal of Section 1985(c), moreover, would serve no substantial public purpose. To the extent that conspirators such as GAF's officers desire the benefits of the conciliation features of Title VII, they are always available, whether or not a charge has been filed with the EEOC. See Section 705(g)(3) and (4).[20] On the other hand, to hold Section 1985(c) inapplicable would render conspiracies to violate Title VII immune from punitive and compensatory damages, neither of which may be fully available under Title VII. See *Johnson* v. *Railway Express Agency, Inc., supra,* 421 U.S. at 460. It would also permit conspirators to take advantage of the

[17] See Section 706(b) of Title VII, 42 U.S.C. 2000e-5(b); *H. Kessler & Co.* v. *EEOC,* 472 F.2d 1147 (5th Cir.) (en banc), cert. denied, 412 U.S. 939 (1973).

[18] Section 706(f)(1) of Title VII, 42 U.S.C. 2000e-5(f)(1).

[19] See Section 706(f)(1) of Title VII, 42 U.S.C. 2000e-5(f)(1).

[20] 42 U.S.C. 2000e-4(g)(3)-(4). See *Young* v. *International Telephone & Telegraph Co.,* 438 F.2d 757 (3d Cir. 1971).

fact that persons who file charges are often unsophisticated and unable to name all guilty individuals in the charge which triggers Title VII's administrative processes. Cf. *Love* v. *Pullman Co.,* 404 U.S. 522 (1972). Finally, Section 1985(c) alone reaches co-conspirators who are not employers or unions but who initiate or knowingly participate in employment discrimination, such as an insurer who compels an employer to enter an insurance contract which deliberately discriminates on the basis of race or sex.[21]

In sum, what was said in *Johnson* v. *Railway Express Agency, Inc., supra,* 421 U.S. at 459, applies equally here: "Despite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief." There is no warrant for denying victims of invidious discrimination the additional remedy provided by Section 1985(c) in the aggravated circumtances to which that provision is uniquely addressed. And the potential of such a recovery against the individual participants in an intentionally discriminatory scheme can only serve as a salutary deterrent.

[21] Contrary to petitioners' assertion (Pet. 13, n.9), Section 1985(c) would not reach employment discrimination by employers with fewer than 15 employees, since no underlying Title VII violation could be established against such an employer. See, *infra,* pages 33-34.

III. SECTION 1985(c) IS CONSTITUTIONAL AS APPLIED TO VIOLATIONS OF TITLE VII

1. There is, in truth, no constitutional question in the case.[22] No serious contention could be made that Congress lacks power to reach those who conspire to violate rights declared by a federal statute, itself of undoubted constitutionality. Indeed, the Court has recognized the constitutional propriety of affording a remedy against wholly private action that interferes with the exercise of rights originally protected only against hostile State action. *United States* v. *Guest*, 383 U.S. 745, 761 (1966) (Clark, J., concurring), 774 (Brennan, J., concurring and dissenting). But, however that may be, no issue can arise when, as is the case under Title VII, the substantive right itself runs against private discrimination and the remedial statute merely provides alternative relief. Insofar as it reaches private action, that has been the premise of the decisions under 18 U.S.C. 241 since *United States* v. *Waddell*, *supra*. Nor is it any objection that the "vindicating" statute casts a wider net, encompassing "outsiders" who seek indirectly to deprive the intended beneficiary of substantive federal rights elsewhere declared. *United States* v. *Johnson*, *supra*.

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[22] Because the court of appeals regarded the Commerce Clause as a fully adequate source of congressional power, it declined to reach the question whether the Thirteenth or the Fourteenth Amendment would support the application of Section 1985(c) to Title VII rights (Pet. App. 46a, 50a n.110). For the same reason, we agree that it is unnecessary to reach these constitutional issues.

As we understand it, these propositions are unchallenged. Instead, although they speak of "constitutional" impediments, petitioners argue that Section 1985(c) was not intended to implement legislation premised on the Commerce Clause. That is, of course, a purely statutory question. Cf. *United States* v. *Price*, 383 U.S. 787, 789 (1966).

2. We note, first, that in *Breckenridge* the Court identified the right of interstate travel as one of the "privileges and immunities" protected by Section 1985(c). 403 U.S. at 105-106. The constitutional origin of that right was not identified, except for the statement that it "does not necessarily rest on the Fourteenth Amendment." *Id.* at 105. Plainly, it was deemed unnecessary to determine whether the drafters of Section 1985(c) expressly invoked whatever constitutional provisions established the right to travel interstate. The same approach was followed in *United States* v. *Guest*, *supra*, in reaching the conclusion that 18 U.S.C. 241 vindicates the same right. 383 U.S. at 759. So here. As it happens, moreover, the right of interstate travel may derive from the Commerce Clause. See *Shapiro* v. *Thompson*, 394 U.S. 618, 630 (1969); *United States* v. *Guest*, *supra*, 383 U.S. at 758-759; *Edwards* v. *California*, 314 U.S. 160, 174 (1941); *Passenger Cases*, 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J. dissenting); *Crandall* v. *State of Nevada*, 73 U.S. (6 Wall.) 35, 49 (1867) (Clifford, J., dissenting).

So long as it is clear that Congress meant to reach aggravated violations of *all* federal rights—save per-

haps those conferred with exclusive enforcement mechanisms—it cannot matter whether each of the potentially applicable sources of legislative power was identified at the time. Cf. *Ex parte Yarbrough*, 110 U.S. 651, 658, 666 (1884). And it is equally irrelevant that the 42d Congress may have entertained a broader view of the Privileges and Immunities Clauses of both Article IV and the Fourteenth Amendment, and a narrower view of the Commerce Clause, than obtains today, provided it intended to "put forth all its powers." *United States* v. *Mosley*, *supra*, 238 U.S. at 387-388. Indeed, if all federal rights were meant to enjoy the protection afforded by Section 1985(c)—albeit only when threatened by invidiously motivated conspiracies—there can be no objection to including Title VII rights merely because the enactment of such a statute was not envisaged in 1871. Any other rule would confine Section 1985(c) to rights already declared, and, in this respect, there is no more basis for so restricting the broad language of our provision than in the case of its criminal analog, 18 U.S.C. 241. See, *e.g.*, *United States* v. *Johnson*, *supra*; *United States* v. *Classic*, 313 U.S. 299, 315-320 (1941).

3. We have already discussed the breadth of Section 1985(c) and shown it to be what its words indicate, a general statute enacting a remedy—and a deterrent—for aggravated group action, animated by class bias, which is intended to deprive citizens of rights secured by federal law. What we have noticed in the legislative history of the provision makes clear that "privileges and immunities under the laws" include all federal statutory rights, present and future, whatever their constitutional underpinnings. Lest any question remain, one or two further references may be appropriate.

The sponsors of the legislation left no doubt that they meant to invoke every source of power. Not only were the Thirteenth, Fourteenth and Fifteenth Amendments expressly mentioned, but also the Privileges and Immunities Clause and the Republican Form of Government Clause of Article IV. Cong. Globe, *supra*, at 500 (Sen. Frelinghuysen). More broadly, it was said that Congress must act to "the uttermost bound * * * of its constitutional power" (*id.* at 691 (Sen. Edwards)), and carry out "all the powers in the Constitution" (*id.* at 382 (Rep. Hawley)). Senator Edmunds, the leading Senate sponsor, was explicit that the provision would vindicate rights created by all federal statutes, present and future. As he said, it would extend to "the rights which the Constitution and the laws of the United States made pursuant to it give to [citizens], * * * whatever those laws may be." *Id.* at 568. Of course, as the Court noted in *Breckenridge*, the provision was narrowed to reach only concerted action motivated by hostility to a class of citizens. But all rights conferred by federal law remain protected against such invidious conspiracies.

4. Only one point remains: the suggestion that Section 1985(c) purports to reach employers not within the coverage of Title VII. There is simply no basis for that objection. As we have sufficiently ex-

plained, Section 1985(c) merely affords a remedy to those whose Title VII rights have been violated in a particular way. It follows that persons not under the umbrella of Title VII are not entitled to invoke Section 1985(c). There is thus no question of constitutional overreaching.[23] The two statutes operate in complete harmony, and their coexistent applicability serves to effectuate the congressional purpose underlying each of them.

[23] If there were, *Breckenridge* teaches that possible unconstitutional applications are no ground for declining to give Section 1985(c) its permissible reach in a case plainly within constitutional limits. 403 U.S. at 104.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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